IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 17, 2006

LOIS M. SPENCE v. ROBERT E. HELTON

Appeal from the Chancery Court for Rutherford County
No. 94DR-214 Don R. Ash, Judge

No. M2005-02527-COA-R3-CV - Filed on April 23, 2007

The trial judge announced in open court that he was granting the mother's petition for modification of child support. Because of a number of miscues, however, a valid order establishing the new level of support was never entered and another judge eventually dismissed the case for failure to prosecute. After the dismissal became final, the mother retained an attorney, who filed a Rule 60.02 motion for relief from the final order of dismissal. The trial court granted the motion since the mother had not been sent notice of the impending dismissal and awarded the mother relief in the form of a *nunc pro tunc* order, which required the husband to pay a child support arrearage from the date of the modification hearing, in the amount of $29,637. The husband argues on appeal that the trial court abused its discretion in granting relief to a litigant who had failed to act diligently in prosecuting her claim. We affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M. S., and FRANK G. CLEMENT, JR., J., joined.

Bert W. McCarter, Murfreesboro, Tennessee, for the appellant, Robert E. Helton.

Charles G. Ward, Murfreesboro, Tennessee, for the appellee, Lois M. Spence.

OPINION

I. A PETITION TO MODIFY CHILD SUPPORT

Robert M. Helton and Lois M. Helton (now Spence) were divorced by order of the Rutherford County Chancery Court on June 27, 1994. In accordance with their marital dissolution agreement, the mother was granted custody of the two children of the marriage, and the father was ordered to pay child support of $350 every two weeks.

Questions involving child support were the subject of several proceedings over the following six years. The mother filed a petition to enforce past due child support, which resulted in a contempt conviction against the father. The father filed two petitions to modify child support, one of which resulted in a reduction in his obligation. The court's order of November 17, 1999 obligated the father to pay $186.92 every other week into the State's Central Child Support Receipting Unit.

The pleading that led to this appeal was a Petition to Modify Child Support, filed by the mother on March 27, 2000. Judge Ash conducted a hearing on the petition on April 28, 2000. The father was represented by an attorney, Alex Meacham. The mother was *pro se.* At the conclusion of the hearing, the trial court announced in open court that it was increasing the father's child support obligation to $880 per month.

The father's attorney drafted an order and lodged it with the court. The order recited that the father was to begin paying $880 per month plus a $44 clerk's fee to the Chancery Court Clerk of Rutherford County. Judge Ash did not sign the order because payment should have been directed to the Central Child Support Receipting Unit. The copy of the order in the record has the following words hand-written on and over the line where the judge's signature would normally go: "VOID - Payment to be made to Nashville. Plaintiff to submit amended order." Judge Ash later held that he had indicated that Mr. Meacham should submit a corrected order.

The voided order submitted by attorney Meacham contained the words "Attorney for Lois M. Helton" below his signature, erroneously identifying him as the attorney for the mother, not the father. This error apparently accounts for the fact that copies of the order were served on the father and Mr. Meacham, but not on the mother, as well as future failures to notify the mother directly.

Attorney Meacham never submitted an amended order to the court, and the matter was allowed to languish. While the trial court's handwritten directive placed the responsibility on "Plaintiff," *i.e.*, the mother, to file a corrected order, she apparently did not receive this directive, and the erroneous order indicated Mr. Meacham was her attorney. The trial court later held it was Mr. Meacham's responsibility to file a corrected order.

II. FURTHER PROCEEDINGS

On August 14, 2001, Circuit Court Judge J.S. Daniel, acting in accordance with the Rutherford County Local Rules, sent out a standard notice stating that since the case had been on file for over a year, it would be dismissed for failure to prosecute unless the attorneys or parties filed "in writing the reasons why dismissal should not occur." The notice was sent to the father and to Mr. Meacham, but there is no indication that it was ever sent to the mother.[1] The copy sent to the father came back undelivered with the notation "unknown address." No response having been

[1] In ruling on the mother's Rule 60 motion, Judge Ash later found that no copy of the notice of potential dismissal had been sent to the mother.

forthcoming, the dismissal order was entered on October 22, 2001. Notice of the dismissal was sent to the father, but again was returned undelivered, and to the mother's last known address. The mother denies that she ever received it.

On October 20, 2004, the mother filed another petition for modification of child support and to enforce medical insurance. The petition referred to the 1999 order and requested an increase. Several months later, the father filed an answer and counter petition. The mother then obtained counsel who filed a notice of appearance.

The mother then filed a Tenn. R. Civ. P. 60.02 motion. The motion, dated March 14, 2005, asked the court to set aside Judge Daniel's order of dismissal and enter the order setting the husband's child support at $880 per month. Counsel asserted that the mother had never received the order of dismissal, noting that she had moved into a new residence in April of 2001, and that the order of dismissal was sent in October of 2001 to her previous address.

A hearing on the Rule 60.02 motion was conducted before Judge Rogers, who concluded that the case could not or need not be resolved through Rule 60.02. He transferred the case to Judge Ash "to decide whether he will sign the order *nunc pro tunc*." Judge Ash conducted a hearing on the matter on July 11, 2005, took the case under advisement, and ordered the parties to submit briefs on the issues raised by the case.[2]

Both parties submitted briefs, and on October 6, 2005, Judge Ash filed a thorough and well-reasoned opinion and an order in which he granted the motion to set aside the dismissal under Rule 60.02 as well as to enter the judgment on the modification petition *nunc pro tunc* to the hearing date of April 28, 2000. An order setting support at $880 per month was entered *nunc pro tunc* April 28, 2000. A later hearing to set the amount of arrearage and repayment schedule was held. The order from that hearing, signed by Judge Rogers, reduced the husband's child support arrearage to judgment in the amount of $29,636.81 including interest. This appeal followed.

III. THE RULE 60.02 MOTION

Relief under Rule 60.02 is considered "an exceptional remedy." *Nails v. Aetna Ins. Co.*, 834 S.W.2d 275, 294 (Tenn. 1992). The purpose of Rule 60 is to alleviate the effect of an oppressive or onerous final judgment. *Whitaker v. Whirlpool Corp*., 32 S.W.3d 222, 231 (Tenn. Ct. App. 2000). "Rule 60.02 acts as an escape valve from possible inequity that might otherwise arise from the unrelenting principal of finality embedded in our procedural rules." *Thompson v. Firemen's Fund Insurance Co.*, 798 S.W.2d 235, 238 (Tenn. 1990). However, the rule is designed to allow the trial court to balance the competing interests of justice and finality. *Banks v. Dement Constr. Co., Inc*., 817 S.W.2d 16, 18 (Tenn. 1991). In examining the purpose of Tenn. R. Civ. P. 60.02, our Supreme Court has said:

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[2]The court asked the parties to brief two questions: (1) Is there a time limit on a Nunc Pro Tunc order? and (2) Can the Court set aside the dismissal of a case after one year?

> "Rule 60.02 acts as an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules. . . ." Because of the importance of this "principle of finality," the "escape valve" should not be easily opened.

Banks, 817 S.W.2d at 18, *quoting Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991).

The party seeking relief has the burden of showing grounds therefor; he or she must show that he is entitled to relief. *Spruce v. Spruce*, 2 S.W.3d 192, 194 (Tenn. Ct. App. 1999); *Howard v. Howard*, 991 S.W.2d 251, 255 (Tenn. Ct. App. 1999); *Davidson v. Davidson*, 916 S.W.2d 918, 923 (Tenn. Ct. App. 1995). There must be proof of the basis on which the relief is sought. *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 624 (Tenn. 2000); *Banks*, 817 S.W.2d at 18; *Duncan v. Duncan*, 789 S.W.2d 557, 563 (Tenn. Ct. App. 1990).

Rule 60.02 reads in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken.

The trial court in this case held that the mother was entitled to relief under clause (5). Despite its broad language, which implies that the section is something of a catch-all provision, Tennessee courts have very narrowly construed Tenn. R. Civ. P. 60.02(5). *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d at 625; *Underwood v. Zurich Insurance Co.*, 854 S.W.2d 94, 97 (Tenn. 1993); *Henderson v. Kirby*, 994 S.W.2d 602 (Tenn. Ct. App. 1996); *Steioff v. Steioff*, 833 S.W.2d 94, 97 (Tenn. Ct. App. 1992); *Tyler v. Tyler,* 671 S.W.2d 492 (Tenn. Ct. App. 1984).

In fact, the standards of Rule 60.02(5) are more demanding than those applicable to the other grounds for relief under the rule. *MCNB Nat'l Bank of N.C. v. Thrailkill*, 856 S.W.2d 150, 154 (Tenn. Ct. App. 1993); *Duncan*, 789 S.W.2d at 564. Relief under Rule 60.02(5) is only appropriate in cases involving extraordinary circumstances or extreme hardship. *Lethcoe*, 18 S.W.3d at 624 (citing *Underwood v. Zurich Insurance Co.*, 854 S.W.2d at 97); *Henderson v. Kirby*, 944 S.W.2d 602, 605 (Tenn. Ct. App. 1996); *Gaines v. Gaines*, 599 S.W.2d 561, 564 (Tenn. Ct. App. 1980). "'[A]ny other reason' under Rule 60.02(5) is to be defined as a reason of 'overriding importance.'" *Banks*, 817 S.W.2d at 19.

Our courts have stated that while Rule 60.02 gives them broad authority, "this power 'is not to be used to relieve a party from free, calculated and deliberate choices it has made.'" *Federated Insurance Company v. Lethcoe,* 18 S.W.3d 621, 625 (Tenn. 2000) (quoting *Banks v. Dement Construction Co.*, 817 S.W.2d 16, 19 (Tenn. 1991)). *See also Cain v. Macklin*, 663 S.W.2d 794, 796 (Tenn. 1984); *Magnavox Company of Tennessee v. Boles & Hite Construction Co.*, 583 S.W.2d 611, 613 (Tenn. Ct. App. 1979).

In ruling on the mother's Rule 60 motion, the trial court issued a detailed memorandum opinion explaining its decision. In pertinent part, the trial court held:

> In this case, the dismissal for failure to prosecute was not proper. The matter had in fact been prosecuted, and a judgment on the merits was announced in open court in the presence of all the parties. If the Respondent's attorney had submitted a corrected order, then it would have been placed in the file and would not have been subject to dismissal for failure to prosecute under Local Rule 3.06. The court does not take lightly the elapse of time since the order of dismissal. This court holds the facts of this case constitute one of extraordinary circumstances and extreme hardship.
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> Further, this court finds the Petitioner did act within a reasonable time under Rule 60.02(5). She heard the announcement of judgment in open court, as did the Respondent, believed the order had been entered, and had no notice the order had not been signed. The fact she did not pursue the matter sooner was not a calculated or deliberate choice, rather she had no notice the case had been improperly dismissed. More importantly, this case is distinct because the judgment had in fact been entered. The Petitioner had prosecuted the case and had not simply failed to take action to bring it to an end.

Whether to grant relief pursuant to Rule 60.02 is a matter within the trial court's discretion, and the trial court's decision will be reversed only for abuse of that discretion. *Lethcoe*, 18 S.W.3d at 624; *Underwood v. Zurich Ins. Co.*, 854 S.W.2d at 97; *Toney v. Mueller Co.,* 810 S.W.2d at 147; *Ellison v. Alley*, 902 S.W.2d 415, 418 (Tenn. Ct. App. 1995). Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000), *citing Overstreet v. Shoney's Inc.,* 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999).

Where a decision is said to lie within the trial court's discretion, appellate review includes determining whether the trial court correctly applied the appropriate legal standards and based its decision on the preponderance of the evidence. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn. 1990); *D. v. K.*, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995).

> A trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice

> to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge, 42 S.W.3d at 85 (citations omitted).

It is clear from the trial court's opinion that it considered the appropriate legal standards and based its decision on the preponderance of the evidence. Under the circumstances presented by this case, we do not believe the trial court abused its discretion in finding that the mother's motion meets the requirements of Rule 60.02(5).

Providing minor children with an appropriate amount of support is a matter of overriding importance, and the unusual circumstances that resulted in the trial court's order of dismissal in this case can certainly be characterized as extraordinary. In this case, the final order the mother is seeking relief from arose from problems with notice which were not of the mother's own making. Neither calculation nor choice played a role in her failure to take steps to timely avert the order of dismissal.

Under Rule 60.02(5) a party may be relieved from a final judgment even when the motion requesting such relief is filed more than one year after the judgment was entered. However, on appeal the father[3] argues that the mother was not entitled to relief because she failed to act within "a reasonable time," as the rule requires. Whether a petitioner has acted within a reasonable time under clause (5) is a question of fact and not one of law. *Henderson v. Kirby*, 944 S.W.2d 602, 606 (Tenn. Ct. App. 1996), *citing Wooley v. Gould, Inc.,* 654 S.W.2d 669, 672 (Tenn. 1983). The trial court's determination that the mother's request for Rule 60 relief was reasonable under the circumstances is not contrary to the preponderance of the evidence. Tenn. R. App. P. 13(d).

The father also suggests that the trial court's willingness to grant the mother's motion despite the passage of three years since the order of dismissal is inequitable as to him and evidences impermissible indulgence towards a *pro se* litigant to the other party's detriment. He relies on the case of *Hessmer v. Hessmer*, 138 S.W.3d 901 (Tenn. Ct. App. 2003)[4], in which this court stated that "the courts must not excuse *pro se* litigants from complying with the same substantive and procedural rules that represented parties are expected to observe." 138 S.W.3d at 903. The proof in the case before us showed that the mother never received notice that the trial court was considering dismissal of her petition, and there was evidence she never received the actual notice of dismissal. Father claims that this should not matter.

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[3] We note that attorney Meacham passed away some time after his appearance in Judge Ash's court, and the father was represented in this appeal by different counsel.

[4] In *Hessmer*, this court also said that "Mr. Hessmer's position on appeal is undermined by his failure to avail himself of the post-judgment remedies available to him through Tenn. R. Civ. P. 59 or Tenn. R. Civ. P. 60.02." 138 S.W.3d at 905. Thus, we did not exclude the possibility of relief from the trial court's order under either of those rules, which is precisely the relief sought in the case before us.

Although the mother did not explain why she delayed as long as she did before trying to rectify the child support situation, we can infer that much of the delay resulted from the lack of notice to her and from confusion as to the status of the modification order after it was announced in open court. The mother was not informed that the modification order had not been signed, and she did not receive notice of the order of dismissal. The trial court specifically found that the mother frequently contacted Mr. Meacham inquiring about the status of the order. None of this confusion was created the mother's actions, but rather resulted from errors and miscues on the part of the father's counsel.

In any event, the father cannot shift the responsibility for complying with legal requirements entirely to the mother. He knew that the court had increased his support payments; he was present in court when that decision was announced. His lawyer was responsible for the omission in having an order entered reflecting that decision and for the court records incorrectly listing Ms. Spence as his client, resulting in her failure to receive the notice. Mr. Helton was under a duty to support his child but, apparently, chose to disregard the court's order that his support payment be increased to reflect an appropriate percentage of his income. Consequently, we fail to see how the trial court's grant of the mother's Rule 60 motion either unfairly prejudiced him or "excused" the mother from compliance with the rules.

We affirm the trial court's grant of relief to the mother pursuant to Tenn. R. Civ. P. 60.02.

IV. THE *NUNC PRO TUNC* ORDER

After the trial court set aside the order dismissing the mother's petition to modify support, the court could have proceeded on that petition and modified the support retroactively as far back as the date of the original petition. *See* Tenn. Code Ann. § 36-5-101(f)(1). However, perhaps because the mother requested it, the trial court achieved much the same result by entering *nunc pro tunc* an order reflecting the trial court's oral ruling at the hearing on April 28, 2000. The father challenges the court's authority to take that action.

Nunc pro tunc is a Latin term which means "now for then." The term is applied to acts permitted to be done after the time when they should been done, and carrying an effect retroactive to the date when they should have been done. *See* Black's Law Dictionary (Fifth Ed. 1979). In situations where a judgment was pronounced but not entered, it may later be entered *nunc pro tunc* as of the date of its pronouncement, provided the requisite facts appear of record to justify its entry. *Thomas v. State,* 337 S.W.2d 1, 4 (Tenn. 1960).

In its memorandum opinion, the trial court relied on the legal principle that it is the duty of the courts to make their records "speak the truth." *Rush v. Rush*, 97 Tenn. 279, 281-82 (1896). The trial court held:

> In this case, the entry of the child support order was made on April 28, 2000. The judgment was announced in open court, in the presence of all the parties. Counsel

> for the Respondent was aware of the judgment as he was instructed to draw up the order. The failure of Counsel of the Respondent to correct and resubmit the order does not affect the truth of the record and entry of the judgment. The Petitioner was not aware the order was never signed, she had repeatedly inquired to opposing counsel as to when he was going to submit the order, and believed it had finally been submitted to the Court in September 2000.
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> This court has the duty to ensure the proper judgment is entered. This neglect on the part of the Respondent's attorney cannot be permitted to change the truth of the judgment the court rendered. It would be an injustice to permit the Respondent to avoid adhering to the judgment rendered in court and to cause the Petitioner to suffer by not receiving what she was owed under the law due to the failure of counsel to submit a corrected order. Therefore, this court holds the entry of the judgment *nunc pro tunc* to the April 28, 2000 hearing date is proper. The motion to enter the judgment is granted.

"The purpose of rendering an order *nunc pro tunc* is to make the record speak the truth by giving the order retroactive effect to compensate for the fact that an order previously granted was not entered of record at the earlier time." *Dewees v. Sweeney*, 947 S.W.2d 861, 863-64 (Tenn. Ct. App. 1996); *see also Cantrell v. Humana*, 617 S.W.2d 901, 902 (Tenn. Ct. App. 1981). The trial court's entry of the order modifying support *nunc pro tunc* in this case, after a full hearing and based on the circumstances herein, was consistent with the applicable legal principles.

The father argues on appeal that the court's decision unjustly places an extreme hardship on him. Father contends that we should place the onus for the arrearage on the mother. We view the equities of the situation differently. The father was also present in open court when the Judge Ash announced the increase in his child support obligation. The father knew what the new amount was, but chose to pay a lesser amount of support during the following years, thereby depriving his children of appropriate support. We therefore do not see any inequity in fully enforcing the father's child support obligation from the date it should have come into effect.

We affirm the entry of the order *nunc pro tunc*.

V.

The judgment of the trial court is affirmed. We remand this case to the Chancery Court of Rutherford County for any further proceedings necessary. Tax the costs on appeal to the appellant, Robert Helton.

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PATRICIA J. COTTRELL, JUDGE